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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 553

LINWOOD BENCH *Petitioner*

v.

W. FRANK SMYTH, JR.,
Superintendent of the Virginia State Penitentiary
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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W. FRANK SMYTH, JR.,
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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Linwood Bunch, of Newport News, Virginia, respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court to review the final decision and judgment of the Supreme Court of Appeals of Virginia, and hereinafter sets forth and represents as follows:

PROCEEDINGS IN COURTS BELOW

Petitioner was convicted on January 5, 1959, in the Corporation Court of the City of Newport News, Virginia, of the crime of rape. Upon this conviction, petitioner appealed to the Supreme Court of Appeals of Virginia, which judgment was affirmed by said Court. Thereafter, petitioner sought a writ of habeas corpus from the Hustings Court of the City of Richmond, Part II. Upon the issuance of said writ, said Court directed that the petitioner be discharged, inasmuch as he was being confined by virtue of a judgment rendered on a null and void verdict.

Respondent appealed this decision of the Hustings Court of the City of Richmond, Part II, to the Supreme Court of Appeals of Virginia. The appellant Court, on September 2, 1960, reversed said decision and remanded petitioner to the custody of respondent.

Bunch is in the Virginia State Penitentiary at Richmond, under sentence of death. The Governor of Virginia has granted a stay of execution until January 4, 1961, to enable Bunch to apply to this Honorable Court for a writ of certiorari.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3) (June 25, 1948, c. 646, 62 Stat. 929).

QUESTIONS PRESENTED

Linwood Bunch assails the judgment of conviction and he here and now contends that he was denied due

process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, specifically as follows:

> He was denied the protection afforded by the Statutes of the Commonwealth of Virginia made and provided wherein the jury is required *to ascertain* the punishment of an accused upon his conviction. (Italics supplied)

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent part of the Fourteenth Amendment to the Constitution of the United States, reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics supplied)

Section 19-267 of the Code of Virginia, 1950, as amended, provides:

> "§19-267. Ascertainment of punishment in criminal cases generally when tried by jury. — The punishment in all criminal cases tried by a jury *shall be ascertained by the jury* try-

ing the same within the lim. s prescribed by law. (Code 1919, §4784.)" (Italics supplied)

Section 19-267.1 of the Code of Virginia, 1950, as amended, contains:

> "§19-267.1. Ascertainment of punishment in felony cases. — The term of confinement in the penitentiary or in jail of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, *shall be ascertained by the jury*, if there be one, or by the court trying the case without a jury, so far as the term of confinement and the amount of the fine are not fixed by law. (Code 1919, §4783.)" (Italics supplied)

STATEMENT OF FACTS

Linwood Bunch, a young negro male, was tried upon a plea of not guilty, on December 9, 1958, in the Corporation Court of the City of Newport News, Virginia. Upon petitioner's said plea to the charge of rape, committed upon the person of a white woman, a jury was impaneled by said Court, subsequently returning the following verdict:

> "We the jury find the Defendant, Linwood Bunch, guilty as charged and *recommend* the penalty of death be imposed." (Italics supplied)

Said Corporation Court did thereafter, on January 5, 1959, enter judgment and pronounce the sentence of death upon the verdict as rendered.

On June 3, 1959, petitioner filed his petition for a writ of habeas corpus in the Hustings Court of the City of Richmond, Part II, alleging that the petitioner was imprisoned and detained by virtue of a judgment of the Corporation Court of the City of Newport News, which judgment was null and void for the reason that the Court was without jurisdiction to sentence the petitioner to death. Upon the prayer of said petition, the Hustings Court of the City of Richmond, Part II, issued out a writ of habeas corpus *ad subjiciendum*. The matter came on to be heard upon said writ and the Hustings Court of the City of Richmond, Part II, did, on July 21, 1959, adjudge that the judgment of the Corporation Court of the City of Newport News, entered January 5, 1959, whereby petitioner was sentenced to death, was void and it further ordered the Superintendent of the Virginia State Penitentiary not to carry into execution the sentence of death imposed upon petitioner by the aforesaid order. (See Appendix I).

The Hustings Court of the City of Richmond, Part II, rendered an opinion in support of said order. (See Appendix II).

Thereupon, the respondent did appeal the order of said Hustings Court, to the Supreme Court of Appeals of Virginia. On the 2nd day of September, 1960, said appellate Court did reverse the decision of the Hustings Court of the City of Richmond, Part II, and did dismiss said writ of habeas corpus theretofore issued (*Smyth v. Bunch*, ___ Va. ___, 116 S. E. 2d 33).

It is from this action of the Supreme Court of Appeals of Virginia that petitioner seeks the issuance of a writ of certiorari. (See Appendix III).

ARGUMENT

Petitioner is confined in the Virginia State Penitentiary at Richmond, in derogation of the rights secured to him by the Fourteenth Amendment to the Constitution of the United States, in that he was denied due process of law and was likewise denied equal protection of the laws.

Section 19-267 and 19-267.1, Code of Virginia, 1950, as amended, *supra*, provide that punishment in a criminal case "shall be *ascertained* by the jury" trying the same, if there be one.

In no uncertain terms do these statutes set out that the jury's function, *inter alia*, is to *ascertain* the punishment. There is no provision wherein the jury is permitted to "recommend" or "advise" or "suggest" punishment.

As the Hustings Court for the City of Richmond, Part II, succinctly pointed out (Appendix II), the word "ascertain" as used in the statute, means: To render; to cause to feel certain, to make confident; to assure; to appraise, to make (a thing) certain to the mind; to free from obscurity or doubt; to determine with certainty. "Certain" is defined as follows: Fixed or stated; settled; determinate; precise; exact. Its synonyms are:

undeniable; unquestionable; undoubt; plain; uncontrovertible; confident. In addition to these there may also be added: assured, absolute, positive, definite, clear, unequivocal, unmistakable and unqualified.

Further, in the opinion of the Hustings Court, rendered July 21, 1959 (Appendix II), the word "recommended" was stated to be defined as follows: To commit; to give in charge; to confine; to entrust; to commend; to present as one's advice; one's choice or as having one's approval or support; to offer or suggest with favoring representation as (to recommend a defendant to the mercy of the Court). In addition to these there may also be added, advise, counsel, suggest, sanction and endorse.

The word "recommend" is certainly not apt if it was the intention of the Legislature to commit to the jury the duty and authority of fixing the exact punishment. It means to advise or counsel; and is not a word expressing finality such as words "assess" or "declare". *People v. Ray* (Cal.) 268 P. 382.

Ordinarily it (recommend) involves the idea that another has the final decision. 76 C.J.S., Recommended, p. 104.

The issue of Linwood Bunch's guilt or innocence was submitted to a jury for its determination and under the law of the Commonwealth of Virginia the jury and the jury alone was empowered to ascertain, fix and determine the punishment, if any, he was to suffer. Code of Virginia, 1950, as amended, Sec. 19-267, supra. It is

apparent from the jury's verdict that they did not agree on any punishment for Linwood Bunch and sought by recommendation "to pass the buck" or responsibility to the Court.

As triers of the facts, the province of the jury ceases with the *ascertainment* of punishment. *Thompson* v. *City of Lynchburg,* 155 Va. 1122, 156 S.E. 392. They must assume and discharge the responsibility of determining the punishment to be inflicted upon the guilty defendant. It then becomes the duty of the Court to impose the punishment so ascertained. In the *Thompson* case, *supra,* the jury returned a verdict undertaking to suspend a jail sentence. The Court entered judgment on the verdict, disregarding the attempted suspension. The Appellate Court held that to be error pointing out that the province of the jury is to ascertain what the punishment should be.

The responsibility and duty of ascertaining the punishment by the jury is imposed upon them by law. In the instant case the jury did not carry out nor discharge their responsibility and duty. They sought to avoid and shirk this charge by passing it on to the Court. As the Hustings Court stated (Appendix II), "It may well be that if they had to bear the decision on their own conscience, one or more of the jury may not have been willing to fix the said penalty with ultimate finality".

In *Nicholas* v. *Commonwealth,* 186 Va. 979, 45 S.E. (2d) 302, the following verdict was returned by the jury.

> "We, the jury, find the accused guilty and fix his punishment at one-hundred dollars fine and thirty days in jail with a suspended sentence".

The Trial Court, advising the jury that they had nothing to do with suspending sentence, instructed the Clerk to re-write the verdict deleting "with a suspended sentence". Thereupon, the Court asked the jury if that was their verdict, they all replying in the affirmative. The Appellate Court held the action of the Trial Court to be error, saying:

> ". . . The verdict originally returned by the jury, suspending the sentence, was, of course, an improper verdict. The jury had no power to suspend the sentence . . . It was the province of the jury to say what the punishment should be ***".

The defect in the jury's verdict in the case at bar is not a mere irregularity but goes to the very substance of it — and radically so. They rendered but a partial verdict, for they failed to make certain the punishment Bunch was to suffer. There is no room in the law for conjecture or surmise when such a state of facts exists. Especially is this true when a sentence of the death penalty is imposed.

The Constitution of the State of Virginia, Article I, Section 8, provides, in part:

> §8. *Concerning criminal prosecutions generally.* — That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the

accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty: He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers **

In criminal cases, the accused may plead guilty; and, if the accused plead not guilty, with his consent and the concurrence of the Commonwealth's attorney and of the court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or plea of guilty, the court shall try the case."

Inasmuch as the jury did not follow the requirement at law that they ascertain the punishment but passed this responsibility on to the Corporation Court of the City of Newport News, contrary to law, in effect, said Court substituted its verdict for that of the jury. This the Court could not lawfully do. In so doing, petitioner was not accorded the rights to which he was entitled under the Code of Virginia, 1950, Section 19-264, *supra*, nor the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States " . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". A two-fold directive has been denied Linwood Bunch — the statutory requirement that the jury ascertain punishment and a Constitutional guarantee of due process of law and equal protection of the laws. *Newberry* v. *Commonwealth*,

192 Va. 819, 66 S.E. (2d) 841; *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S. E. (2d) 810. For this reason petitioner submits the mandate of the Federal Constitution is not satisfied and accordingly, the sentence imposed upon him by said Court on January 5, 1959, is null and void. *Catlett* v. *Commonwealth*, 198 Va. 505, 95 S. E. (2d) 177.

In support of petitioner's position that each and every element of the jury's function in a trial upon a plea of "Not Guilty" is substantively of the utmost importance and mandatory, the case of *Dixon* v. *Commonwealth*, 161 Va. 1098, 172 S.E. 277, is cited.

In the *Dixon* case, *supra*, the following facts were established: Accused was arraigned upon an indictment which charged that he "unlawfully and feloniously did kill and murded one William Haas". Upon his arraignment he pleaded "guilty"; thereupon, the Court impaneled a jury to try the case; at the conclusion of the evidence and arguments, the jury returned a verdict of guilty of first degree murder as charged and fixed his punishment at death; thereafter, the Court entered judgment upon this verdict, sentencing the accused to death. The Supreme Court of Appeals of Virginia, through Epes, J., held the judgment of the Trial Court must be reversed because the mandatory requirement of the Constitution of Virginia: Article I, Section 8, *supra*, wherein it is directed that in any criminal case, upon a plea of guilty, the Court shall try the case, without the intervention of a jury, was denied accused.

Dixon v. *Commonwealth*, *supra*, is authority for the proposition that the Constitution of Virginia makes it

mandatory that an accused *shall* be tried by the Court upon a plea of guilty and failure of a Trial Court to so do, renders the judgment void. *Cottrell* v. *Commonwealth*, 187 Va. 351, 46 S.E. (2d) 413.

In the case at bar, we have before us a right fundamentally imbued in the Constitution of the Commonwealth of Virginia — full trial by a jury. Ascertainment of punishment by a jury is as much a part of this right as the right to have a jury find guilt or innocence, unless so charged by statute. *Bracey* v. *Commonwealth*, 132 Va. 598, 111 S.E. 131.

As zealously as is guarded an accused's right to be tried by the Court and by the Court alone on a plea of guilty, *a fortiori*, the right of *full* trial by jury must be extended the same, if not greater, protection!

Nowhere in the reported cases of the several states of this Union, where juries are directed by law to "assess", "determine", "prescribe", "fix" or "ascertain" the punishment of an accused, can there be found a decision wherein the *death penalty* was imposed by "recommendation" of the jury and this action by the jury held to have complied with their legal obligation, duty and charge. In *Underhill* v. *Commonwealth*, (Ky.) 289 S.W. (2d) 509, a case which holds the word "recommend" in a jury's verdict when they are required by law to "fix" accused's punishment, is non-prejudicial error, the soundness of the above statement is manifest for the Court concluded such action by the jury constituted non-prejudicial error, ". . . Inasmuch as the *minimum sentence* was imposed upon the appel-

lant **." Had the jury "recommended" the maximum penalty (which would have been death) it is reasonable and fair to conclude that the Appellate Court would have decided otherwise.

By the same token, the case styled *Lewis* v. *State*, 51 Ala. 1, may very well had been decided otherwise had the jury returned a verdict imposing the death penalty. The *Lewis* case, *supra*, was followed by the Supreme Court of Appeals of Virginia in the decision of *Smyth* v. *Bunch*, *supra*. In fact, the *Lewis* case, *supra*, was the basis of said decision. **(See Appendix III).**

Accordingly, it is submitted the Hustings Court properly held the jury's verdict, as recorded in the judgment order of January 5, 1959, of the Corporation Court of the City of Newport News, a nullity and the judgment entered thereon void.

Again, in *Dixon* v. *Commonwealth*, *supra*, the Court said:

> *"The provision of section 8, art. 1, of the Constitution, here under consideration, is self-executing, and goes to the very nature of the tribunal by which an accused who pleads guilty shall be tried. It cannot be waived by the accused, and, if breached, objection to its breach may be raised for the first time in this court.*

In Hopt v. Utah, 110 U.S. 574, 44 S.Ct. 202, 204, 28 L. Ed. 262, Justice Harlan, in holding that the accused could not waive the statutory requirement as to his personal presence at his trial, said:

'The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.' I Bl. Comm. 133. The public has an interest in his life and liberty. *Neither can be lawfully taken except in the mode prescribed by law.* That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with ***. See also, Noell v. Comm., 135 Va. 600, 115 S.E. 679, 30 A.L.R. 1345.' " (Italics supplied)

From the above, it is readily seen that such a substantive defect as is found in the case at bar *cannot* be waived by the accused. If it were conceded (which, of course it is not) as the respondent may contend, that the defective verdict rendered by the jury in the instant case is one strictly of form and not one which goes to the deprivation of a fundamental right, we must ascertain upon whom rests the duty to reform defective verdicts as to matters of form. In *Williams* v. *Commonwealth*, 153 Va. 987, 151 S.E. 151, the Court, referring to the *Trial Court's* duty to reform defective verdicts said, through Prentis, C. J.:

"It is also clearly their duty to see that the jury is not discharged upon the return of an

illegal verdict. In such event they should be properly instructed, and not discharged (except for some other good reason) until they have found and returned a legal verdict upon which the appropriate judgment can be based ** it is always necessary, however, before a judgment can be entered upon a verdict, that it appear just what the jury found or intended to find. Winn Bros. v. Lipscomb, 127 Va. 560, 103 S.E. 623; Fields v. Commonwealth, 129 Va. 780, 106 S.E. 333; Pflaster v. Commonwealth, 149 Va. 461, 141 S.E. 115."

A verdict should be unambiguous; 19 M. J., Verdict, Sec. 18. The Supreme Court of Appeals of Virginia, in *Porterfield* v. *Commonwealth*, 91 Va. 801, 22 S.E. 352, stated:

"The proper practice in such cases is for the Trial Courts to see that the verdict of the jury is put in proper form before they are discharged, but if any change in the substance of the verdict is to be made, the jury should be sent back to their room where they can untrammel by the presence or interference of others find such verdict as they deem proper."

Reforming defective verdicts in the presence of a jury and before they are discharged is the Trial Court's duty. 19 M. J., Verdict, Sec. 36.

As seen in the *Thompson* case, *supra*, the jury attempted, through its verdict, to suspend the jail sentence. The Trial Court entered judgment on the verdict. The Appellate Court held that to be error saying it is the duty of the Trial Court to put the verdict in

proper form to state clearly the intention of the jury. If there is an ambiguity apparent on the face of the verdict, a poll of the jury may be taken to clarify it; but if it is a matter that cannot be so corrected, then the proper practice is to send the jury back to their room where they can, "untrammelled by any outside influence, arrive at a proper verdict." Continuing, the Court said:

> "In the case at bar we are dealing not with a reformed or amended verdict, but with a verdict which shows upon its face the clear intention of the jury to impose upon the defendant only a pecuniary punishment. This, of course, under the statute adverted to, they could not do. In this situation it was the duty of the trial court to instruct the jury as to the measure of punishment and to further instruct the jury that they were without power to suspend the jail sentence. Thus instructed, the jury should have been sent back to their room to further consider their verdict. **"

It is the duty of the Trial Court to undertake to reform defective or ambiguous verdicts as to matters of form in the presence of a jury before they are discharged in order to show what they intended to find. *Carpenter v. Commonwealth*, 193 Va. 851, 71 S.E. (2d) 377.

Again, in *Nicholas v. Commonwealth*, *supra*, the following excerpt from an opinion of the Court written by Justice Buchanan, is found:

> "The verdict originally returned by the jury, suspending the sentence, was, of course, an improper verdict. The jury had no power to

suspend the sentence. Upon their undertaking to do so, the proper procedure would have been for the court to explain that fact to them and send them back to their room to write a legal verdict. It was clear from the verdict, as originally written, that the jury did not think the defendant should pay the fine assessed and also serve the jail sentence. If they had had an opportunity to confer about it after being told their original verdict could not be received, they might have fixed a different punishment, which the law permitted, or found a different verdict.

The defendant had a right to have the jury make up their own minds and reach their own conclusion about that, without aid or suggestion from the court. *** It was the province of the jury to say what the punishment should be, and it was important that they should decide about that in the seclusion of their own room, with each one free to express and to support with argument his views, uninfluenced and undeterred by any expression or opinion save their own."

The Trial Court has no power to supply omissions, and the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. The Judge cannot, under the guise of amending the verdict, invade the province of the jury, or substitute his verdict for theirs. 53 Am. Jur., Trial, Sec. 1954, p. 758. See also *Mills* v. *Commonwealth*, 7 Leigh (34 Va.) 751; *Melton* v. *Commonwealth*, 132 Va. 703, 111 S.E. 291.

Paraphrasing the opinions and decisions hereinabove set out, and applying them to the instant case, this in-

escapable conclusion arises: the verdict returned by the jury whereby they "recommend" the penalty of death, was, of course, an illegal verdict; the jury had no power to "recommend"; upon their undertaking to do so, the proper procedure would have been for the Trial Court to explain that fact to them and send them back to their room to write a legal verdict; it was clear from their verdict that they were "passing the buck" or their responsibility to the Trial Court. Had they been given the opportunity to confer in the seclusion of their own room, they might have rendered a different verdict as to punishment; the Trial Court could not legally enter the judgment order upon the nullity as rendered; the Corporation Court of the City of Newport News undoubtedly did, thereby rendering the judgment order entered thereon void.

Inasmuch as the defect in the verdict could not be waived by petitioner and the Corporation Court for the City of Newport News failed to follow the proper procedure upon receipt of said defective verdict, but entered judgment upon a nullity, the Hustings Court for the City of Richmond, Part II, committed no error in declaring said judgment void.

For the reasons heretofore stated, the defective verdict rendered in the Corporation Court of the City of Newport News on December 10, 1958, and the judgment subsequently entered thereon, affected the very essence of the rights created by virtue of the Constitution of the United States, the Constitution and the Statutes of the State of Virginia, thereby depriving Linwood Bunch of a substantive right. The defect in th

verdict rendered is more than superficial, technical or mere error. It goes to the very nature of the jurisdiction of the tribunal in which petitioner was tried and is such a radical defect as to render the judgment order of January 5, 1959, a nullity — absolutely void. Upon these facts there was want of jurisdiction of the Corporation Court of the City of Newport News to fix or determine the punishment or to accept the recommendation of the jury.

Could an accused be prejudiced any more than by the failure of a Trial Court to follow a statutory requirement *coupled with* Constitutional mandates? An ingredient of unfairness actively operated in the process that resulted in petitioner's confinement, that is, the imposition by the Court of its own verdict in the place and stead of that of the jury. *McDorman v. Smyth*, 188 Va. 474, 50 S.E. (2d) 423. See *Dixon v. Commonwealth*, *supra*. Also see *Ex Parte Rollins*, 80 Va. 314; *Ex Parte Marx*, 86 Va. 40, 9 S.E. 475; 25 Am Jur., Habeas Corpus, Sec. 55. The Judge cannot invade the province of the jury nor substitute his verdict for theirs. 53 Am. Jur., Trial, Section 1954, *supra*.

This Honorable Court has recognized, innumerably, that due process, guaranteed by the Fourteenth Amendment, is denied an accused when he is deprived of that fundamental fairness, which is essential to the very concept of justice. *Payne v. Arkansas*, 356 U.S. 560, 2 L. ed (2d) 975, 78 S. Ct. 844. See *Lisenda v. California*, 314 U.S. 219, 86 L. ed 166, 62 S. Ct. 280.

The judgment of conviction against Linwood Bunch rests upon speculation, conjecture and surmise as to the

real and actual meaning and intention of the jury's verdict. By the obvious action of the jury in refusing to accept the responsibility placed upon them by the law of ascertaining the punishment Bunch was to suffer, the Trial Court did that which the jury was *required* to do.

A Court is shouldered with heavy responsibility where life is at stake. *Edwards* v. *New York*, 1 L. ed (2d) 17, 76 S. Ct. 1058. Indeed, the importance of a careful consideration must be recognized and appreciated in a death case. *Bute* v. *Illinois*, 333 U. S. 640, 92 L. ed 986, 68 S. Ct. 763.

What manner of men are we that we would sanction such action in a case wherein the penalty so imposed is death? Can we feel so little compassion for the law as to permit its administration in this form, that is, the imposition of the death penalty which rests upon an interpretation of an uncertain and ambiguous jury verdict. If an affirmation of the action of the Supreme Court of Appeals of Virginia be made, such affirmation would manifest man's inhumanity to man.

Ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the accused. *Ex Parte Webb*, 225 U. S. 663, 56 L. ed 1248, 32 S. Ct. 769; *Jackson* v. *Taylor*, 353 U. S. 569, 1 L. ed (2d) 1045, 77 S. Ct. 1027.

The requirements of the due process clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after

guilt has been established in accordance with the procedure demanded by the Federal Constitution. *Chessman v. Teets*, 354 U. S. 156, 1 L. ed 1253, 72 S. Ct. 1127.

PRAYER

Accordingly, petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia.

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Attorneys for Petitioner

Dated: November 29, 1960.

PROOF OF SERVICE

I, T. W. Messick, an attorney of record for Linwood Bunch, petitioner herein, depose and say that on the 22nd day of November, 1960, I served a copy of the foregoing petition, by mailing the same, with first class postage prepaid, to the following counsel of record:

Albertis S. Harrison, Jr.
Supreme Court Building
Richmond, Virginia,
Attorney General of Virginia

T. W. Messick
T. W. MESSICK

Subscribed and sworn to before me at Roanoke, Virginia, this 22nd day of November, 1960.

Mary D. White
Notary Public

My commission expires:
May 8, 1964

APPENDIX I

ORDER OF JULY 21, 1959, OF THE HUSTINGS COURT OF THE CITY OF RICHMOND, VIRGINIA, PART II

This case came again this day to be heard upon the Writ of *Habeas Corpus* heretofore issued herein, and the Court, having considered the argument of counsel, and for the reasons stated in a written opinion, hereby filed as a part of the record, the Court doth adjudge and order that the judgment of the Corporation Court of the City of Newport News entered January 5th, 1959, whereby the petitioner, Linwood Bunch, was sentenced to death, is void.

Wherefore the Court doth order that the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, do not carry into execution the sentence of death imposed upon the petitioner, Linwood Bunch, by the aforesaid order, but in lieu thereof he do return custody of the said Linwood Bunch to the Sergeant of the City of Newport News for such disposition as the Commonwealth may be advised.

And the Court not being advised as to whether an appeal is contemplated to the foregoing order, the Court doth suspend execution thereof for a period of sixty days during which time the respondent is authorized to retain custody of the said petitioner, Linwood Bunch.

Enter this Order.

M. R. D., Judge

Teste: CHAS. R. PERDY, Clerk
By: IVA R. PERDY, D. C.

APPENDIX II

Opinion of July 21, 1959, of Hustings Court Part II, City of Richmond, Virginia

Doubles, J. This is a *habeas corpus* proceeding in which the petitioner claims that the verdict of the jury is a nullity and that the judgment of the Court pronounced thereon is void.

The petitioner was tried in the Corporation Court of the City of Newport News on December 9-10, 1958, on a charge of rape upon his plea of "Not Guilty" by a jury, who returned the following verdict: "We the Jury find the defendant Linwood Bunch guilty as charged and recommend the penalty of death be imposed." A Motion by counsel for the defendant that the verdict be set aside as contrary to the law and the evidence, argued at a later date, was overruled, and on January 5th, 1959, the Court sentenced the petitioner to death. A writ of error to this judgment was denied at no time during these post-trial procedures was the question of validity of the verdict raised.

This Court issued a writ of *habeas corpus* to test the validity of the verdict and the question is whether the language of the jury in recommending a punishment instead of fixing it is sufficient.

Section 19-267 of the Code of Virginia provides as follows:

"The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law."

What then is meant by the word "ascertain" as used in the statute? According to Webster's New International Dictionary (Unabridged), "ascertain" is defined as follows: To render certain, to cause to feel certain; to make confident; to assure; appraise. Archaic and obsolete definitions are: To make (a thing) certain to the mind; to free from obscurity or doubt; to determine with certainty.

The word "certain" is defined as follows: Fixed or stated; settled; determinate; precise; exact. Synonyms are: undeniable; unquestionable; undoubted; plain; uncontrovertible; confident.

From such definitions as stated above, it is common parlance in legal circles in Virginia to refer to the jury as "fixing" the punishment of the defendant.

The jury in the present case "recommended" a punishment. Did it thereby "ascertain" it? "Recommend" is defined as: To commit; to give in charge; to consign; to entrust; to commend; to present as one's advice; one's choice or as having one's approval or support; to offer or suggest with favoring representation as (to recommend a defendant to the mercy of the Court).

As between the jury and the Court in Virginia, it is the sole function of the jury to assume and discharge the responsibility of what disposition shall be made of a guilty defendant within the limits prescribed by law. Nothing is left to the consideration of the Court except to impose the punishment thus determined upon and fixed by the jury. There is no room for the jury to make

suggestions to the Court by way of recommendations advice, suggestions, or the like.

In the present case it seems clear enough that the jury thought the defendant deserved the death penalty but they did not assume and discharge their responsibility of fixing it but attempted to pass this responsibility on to the Court. It may well be that if they had to bear the decision on their own conscience, one or more of the jury may not have been willing to fix the said penalty with ultimate finality. But irrespective of the reason, the fact remains that they did not in their verdict discharge the responsibility reposed upon them by law, and the verdict is a nullity.

Being a nullity, no valid judgment could be pronounced by the Court thereon, therefore, this Court is of opinion that the judgment of the Corporation Court of the City of Newport News entered on January 5th, 1950, is void and that the said sentence cannot lawfully be carried into execution by the Superintendent of the Penitentiary.

APPENDIX III

OPINION OF SEPTEMBER 2, 1960, OF THE SUPREME COURT OF APPEALS OF VIRGINIA

PRESENT: EGGLESTON, C. J., SPRATLEY, WHITTLE, SNEAD, and I'ANSON, J. J.

W. FRANK SMYTH, JR., Superintendent, etc.

v. RECORD NO. 5118

LINWOOD BUNCH

Opinion by Justice Lawrence W. I'Anson, Staunton, Virginia, September 2, 1960.

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

M. RAY DOUBLES, Judge.

This case is before us on a writ of error and *supersedeas* granted W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, to an order of the Hustings Court of the City of Richmond, Part II, in a *habeas corpus* proceeding wherein the court adjudged to be void the final judgment order of conviction of the Corporation Court of the City of Newport News entered on January 5, 1959, imposing a death sentence upon Linwood Bunch, hereinafter sometimes referred to as petitioner, on a jury verdict of guilty to a charge of rape.

The material proceedings in the Corporation Court of the City of Newport News, on which the court below held the verdict of the jury a nullity and the judgment entered thereon to be void, are as follows:

On December 9 and 10, 1958, petitioner, who was represented by two attorneys of his own choosing, was tried on a plea of "not guilty" to an indictment charging rape, and the jury returned the following verdict:

"We the jury find the defendant Linwood Bunch guilty as charged and recommend the penalty of death be imposed."

When the jury returned their verdict the trial judge inquired of counsel if there were any objection to the form of the verdict, to which one of counsel replied that there was none. The trial judge then asked if counsel desired to poll the jury, and upon receiving an affirmative answer the clerk asked each juror, "Is this your verdict," to which each replied, "Yes, sir." After the jury was discharged without objection, defense counsel moved to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence, which motion was overruled.

On January 5, 1959, counsel again moved that the verdict of the jury be set aside on the same grounds heretofore assigned, which motion was again overruled and the court, after inquiring of Bunch if he had anything to say as to why he should not then be sentenced in accordance with the verdict of the jury, sentenced him to death in the electric chair.

From this final order petitioner applied to this Court for a writ of error and *supersedeas*, contending among other things that the verdict of the jury was contrary to the law and the evidence, but he did not question the form of the verdict. On March 11, 1959, after considering the petition and the record we denied the writ of error and *supersedeas*. *Linwood Bunch* v. *Commonwealth*, 200 Va. lxxi.

On June 18, 1959, Bunch filed a petition for a writ of *habeas corpus* in the court below, alleging for the first time that the verdict of the jury is a nullity and that the judgment entered thereon is void because the use of the word "recommend" in the verdict of the jury did not "fix" any punishment but merely recommended it and, therefore, the court was without jurisdiction to accept the recommendation of the jury.

After a hearing and argument of counsel on the writ of *habeas corpus ad subjiciendum* awarded Bunch upon the filing of his petition, the court below in a written opinion held that the use of the word "recommend" in the verdict of the jury did not *fix* any punishment; that the verdict was a nullity, and that the judgment entered thereon was void.

Section 19-267, Code of Virginia, provides as follows:

"The punishment in all criminal cases tried by a jury shall be *ascertained* by the jury trying the same within the limits prescribed by law." (Italics supplied.)

Under the provisions of the statute it is the duty of the jury to ascertain and make clear to the court, the defendant, and counsel their intention relative to the punishment to enable the court to impose sentence in its final judgment order. While in Virginia the word "fix" has been traditionally used by trial courts in instructions to juries, which was done in the case at bar, and in verdicts ascertaining punishment, the specific word "fix" is not found in, nor its employment required by, the statute.

Strict technical form is not required in a verdict, and this Court will go far in disregarding immaterial defects in verdicts which have been accepted by trial courts, if, notwithstanding such defects, the real finding of the jury may be determined. It is always necessary, however, before a judgment can be entered upon a verdict, that it appear with reasonable certainty what the jury found or intended to find. *Willoughby v. Smyth*, 194 Va. 267, 271, 72 S.E. 2d 636, 639; *Williams v. Commonwealth*, 153 Va. 987, 994, 151 S.E. 151, 153; *Mayer v. Commonwealth*, 140 Va. 566, 570, 125 S.E. 318, 319.

So far as we have been able to find, the exact question now before us has not heretofore been before this Court. But courts in other jurisdictions have dealt with the matter in *habeas corpus* proceedings and in direct appeals.

The punishment ascertained by juries must be in conformity with the applicable statutes; but mere inaccuracies or informalities in ascertaining or assessing the

punishment will not vitiate the verdict if it is clear and intelligible as to the punishment intended. 23 C. J. S., Criminal Law, § 1408(c), p. 1105; *Ex Parte Mote* (1955 Ky.), 275 S.W. 2d 48 (*habeas corpus*); *Smith* v. *State*, 157 Tex. Cr. R. 399, 248 S.W. 2d 937 (direct appeal); *Sillemon* v. *State*, 169 Tex. Cr. R. 350, 269 S.W. 2d 382 (direct appeal); *Salter* v. *State*, 74 Ga. App. 658, 20 S.E. 2d 586 (direct appeal). See also 36 Words and Phrases, Recommend, 1960 Cum. Supp. pocket part, p. 123.

In *Ex Parte Mote, supra*, the Kentucky statute provided that the jury "fix" the punishment and the verdict of the jury read:

"We, the jury, find the defendants * * * guilty as charged in instruction No. 1, and *recommend* full penalty of one year in jail * * *." (Italics supplied.)

It was argued (275 S. W. 2d at p. 49) that the judgment was void because of the use of the word "recommend" instead of "fix" in the verdict, which point was raised for the first time in the *habeas corpus* proceeding. In disposing of this argument, the court held that the verdict was sufficiently definite to express the decision of the jury so as to enable the court to intelligently render a judgment thereon.

In *Smith* v. *State, supra*, the Texas statute made it mandatory for the jury to "assess" punishment, and the court said (248 S. W. 2d at p. 938):

"The question for our determination, then, is * * *: Does the word, 'recommend,' as used in the verdict,

have the same meaning as the word 'assess,' as used in the statute?

* * * * *

"In *Lewis* v. *State*, 51 Ala. 1 (a murder case), the verdict was to 'recommend' punishment of twenty years. It was there contended that the word, 'recommend,' did not sufficiently declare the exercise of discretion by the jury in fixing the period of imprisonment in the penitentiary. In disposing of the question adversely to that contention, the Supreme Court of Alabama said:

" 'It is true that this is not possibly the most apt word that could have been used in such a case. But it certainly fixes the time of imprisonment with sufficient clearness to enable the court to carry the verdict into effect by its judgment. This is enough. The court will construe the language used in reference to the purpose necessarily intended.'

"We are unwilling to give a strict construction to the words, 'assess' and 'recommend,' as used in the case before us, but rather, will construe the word 'recommend' as did the Alabama court, in the sense that assessment of punishment was intended by the jury."

In *Salter* v. *State*, *supra*, the defendant was indicted and tried for murder and the jury returned the following verdict:

"We, the jury, find the defendant guilty of voluntary manslaughter, and *recommend* that he serve 2 yrs. minimum, maximum 5 yrs. *:* *." (Italics supplied.)

Pursuant to this verdict the judge sentenced the defendant to serve from two to five years. The defendant contended that the verdict as written did not prescribe or fix the punishment, but merely recommended it. On appeal, the court held (40 S. E. 2d at p. 587) that the judgment was not void because the verdict used the word "recommend," instead of the word "fix" in accordance with the charge of the judge, or the word "prescribe" as used in the statute; that the failure to use the word "fix" or "prescribe" instead of "recommend" was merely an irregularity which was not harmful, since the verdict was in substantial compliance with the statute.

In *Underhill* v. *Commonwealth* (1956 Ky.), 289 S. W. 2d 509, a robbery case, the verdict read:

"We the jury find * * * guilty and *recommend* the minimum sentence of 21 years * * *. (Italics supplied.)

It was argued that the verdict was defective because it did not fix the appellant's punishment as required by the statute. The court held (289 S. W. 2d at p. 511) that the failure to object to the form of the verdict before the discharge of the jury constituted a waiver of a non-prejudicial error.

The record of the proceedings in the Corporation Court of the City of Newport News shows that the jury were instructed by the court that if they found Bunch guilty to "fix" his punishment, and they should have employed the word "fix" or one synonymous therewith in wording their verdict. But their failure to do

so, using the word "recommend" instead of "fix," was a mere irregularity which was amendable before the jury was discharged, and would no doubt have been amended if the court's attention had been called to it. (*Carpenter v. Commonwealth*, 193 Va. 851, 856, 858-859, 71 S. E. 2d 377, 379, 380, 381.) Counsel stated that he had no objection to the form of the verdict and requested a polling of the jury; at the court's suggestion. The verdict of the jury was clear and intelligible enough, as to the punishment ascertained and intended for the court to enter its judgment on the verdict, and Bunch and his counsel raised no question as to its meaning or validity even though there was almost a month for reflection between the date of the verdict and the pronouncement of judgment. Indeed, the question of the validity of the verdict and the judgment entered thereon was not raised until after this Court had denied a petition for a writ of error. While it is true that the verdict is not in the language usually employed, it clearly shows that the jury ascertained and found that death penalty should be imposed on the petitioner. A verdict is to be reasonably construed and in such manner as to give it the meaning intended by the jury, and should be declared void for uncertainty only when its meaning cannot be reasonably determined. The verdict was in substantial compliance with Code § 19.1-[illegible] and its form was not prejudicial to the petitioner. We hold that the judgment entered on the verdict is not void.

In no event can *habeas corpus* be maintained. Under well settled principles, the office of *habeas corpus* is not to review errors committed in the trial, but is a

lateral attack on a judgment and raises the sole question of whether the judgment is void under which the petitioner is confined. *Hobson v. Youell*, 177 Va. 916, 916, 18 S. E. 2d 76, 80; 25 Am. Jur., Habeas Corpus, § 13, pp. 151-152.

We have said many times that *habeas corpus* will not be used to review mere irregularities, errors or defects in decrees or judgments since the law provides a remedy by appeal or writ of error to obtain their correction. *Hobson v. Youell, supra*, 177 Va. at p. 916, 18 S. E. 2d at p. 80; *Hanson v. Smyth*, 183 Va. 354, 362, 32 S. E. 2d 146, 153; *Smyth v. Morrison*, 200 Va. 728, 732, 107 S. E. 2d 230, 233. "The same rule applies to immaterial defects and irregularities in verdicts." *Willoughby v. Smyth, supra*, 104 Va. at p. 272, 52 S. E. 2d at p. 650.

The petitioner is in effect attempting to substitute *habeas corpus* for another petition for writ of error, which is barred under the statute by the passage of time.

Habeas corpus is not to be substituted for a writ of error or an appeal and will not lie to attack a judgment of conviction which is merely voidable by reason of law or of fact, omissions or other irregularities. *Hanson v. Smyth*, 183 Va. 354, 358, 32 S. E. 2d 146, 148; *Willoughby v. Smyth, supra*; *Royster v. Smyth*, 196 Va. 928, 932, 86 S. E. 2d 855, 857.

For the reasons stated, the judgment complained of is affirmed and the petition dismissed.

Record and final judgment.